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SUPREME COURT, U.S.

80-6604

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

The opinion of the Supreme Court of Georgia is reported as follows at 266 S.E.2d 499:

THOMAS

v.

The STATE.

No. 36046.

Supreme Court of Georgia.

Argued March 12, 1980.

Decided April 23, 1980.

Defendant was convicted on a jury verdict before the Fulton Superior Court, Weltner, J., of murder and was sentenced to death, and he appealed. The Supreme Court, Marshall, J., held that: (1) evidence was sufficient to support conviction; (2) trial court did not err in excusing jurors who were irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings; (3) death qualification voir dire question did not violate defendant's right to an impartial jury and was not unconstitutional; (4) defendant was not put to trial while still under outstanding order of incompetency; (5) defendant waived his right to appeal any error in trial court's instruction to the jury to scan with care any incriminating statements made by witness; and (6) evidence supported jury's finding that the murder was outrageously and wantonly violent and inhuman in that it involved torture and depravity of mind so as to support imposition of the death penalty.

Judgment affirmed.

Hill, J., filed concurring opinion.

1. Criminal Law ⇐742(1)

Credibility of witnesses is matter left to the jury. Code, § 38-1805.

2. Homicide ⇐250

Evidence, viewed in the light most favorable to the verdict, supported finding by rational trier of fact of essential elements of crime of murder beyond a reasonable doubt.

3. Jury ⇐108

In prosecution for murder, trial court did not err in excusing jurors who were irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. Code, § 59-806, subd. 4.

4. Jury ⇐131(8)

In prosecution for murder, "death qualification voir dire question" did not violate defendant's right to impartial jury on ground that it excluded identifiable segment of the community. Code, § 59-806, subd. 4.

5. Jury ⇐84

Statute providing for "death qualification voir dire question" is not unconstitutional on the ground that it does not meet constitutional standards of specificity and clarity in determining view of potential juror toward the death penalty. Code, § 59-806, subd. 4.

6. Criminal Law ⇐1213

Georgia death penalty statute is not unconstitutional.

7. Witnesses ⇐306

Privilege against self-incrimination is that of the person under examination as a witness and is intended for his protection only; defendant on trial had no standing to raise the issue.

8. Witnesses ⇐296

Witness cannot refuse to testify relative to material matters concerning crime committed by member of his family on basis that his answer would bring disgrace, infamy, or public contempt upon him or his family. Code, § 38-1205(a).

9. Mental Health ⇐6

Where, in response to a special plea of insanity, defendant was examined by two psychiatrists who tendered conflicting reports, defendant was then transferred for examination by hospital staff by the court which stated that the reason for the transfer was that defendant might be presently incompetent, and doctors at state hospital, after examining the defendant, certified his competency to stand trial, defendant was not put to trial for murder while still under outstanding order of incompetency.

10. Criminal Law ⇐1137(1)

Where defense counsel requests giving of certain jury charge but agrees to trial judge's giving of another charge in lieu thereof, any error in the charge given is in effect induced and cannot be complained of on appeal.

11. Criminal Law ⇐1137(1)

Defendant would not be permitted to assert on appeal error in jury instruction, where trial judge informed defense counsel that he would instruct the jury to scan with care any incriminating statements made by witness, but the term "confession" would not be used in the jury instructions, and defense counsel agreed to the trial judge's giving of this modified version of defendant's requested charge.

12. Criminal Law ⇐1206(2)
Homicide ⇐354

Evidence which showed brutal strangulation murder of nine-year-old victim who weighed less than 60 pounds and admission by defendant to witness that defendant had killed the child by beating him with a stick and choking him to death supported jury's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind, so as to support imposition of the death penalty; sentence to death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code, §§ 27-2534.1(b)(7), 27-2537(c)(1-3).

Jack Dorsey, Atlanta, for appellant.

Lewis R. Slaton, Dist. Atty., Carole E. Wall, Asst. Dist. Atty., Arthur K. Bolton, Atty. Gen., W. Davis Hewitt, Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

Donald Wayne Thomas, the appellant, was convicted in Fulton County Superior Court of the April 19, 1979, murder of Dewey Baugus, a nine-year-old child. He was sentenced to death, and this is his appeal.

From the evidence introduced at trial, the jury was authorized to find the following facts:

On April 11, 1979, Dewey Baugus and a playmate left his mother's home on Primrose Circle in Atlanta to go to a ball game. After the game, the two children separated to return to their respective homes in the early evening darkness. This was the last time the victim was seen alive.

The appellant, a 19-year-old male, lived at a rooming house on Primrose Circle. Linda Cook, the appellant's girlfriend, had stayed with him for approximately a week during the time in question. The appellant had kept her locked in the room when he was not there, with a bucket he provided as her only toilet facility. Linda Cook testified that when the appellant returned to the room on Friday, April 13, she noticed that he had a lot of blood on the front of his pants. The appellant took her to the railroad tracks behind Primrose Circle and showed her the body of the victim, lying face down, and told her that he had killed the child by beating him with a stick and choking him. In her presence, the appellant rolled the body over. Telling her that he had to make sure that he was dead, the appellant then jumped on the neck of the victim. Thereafter, he threw the victim's body in the bushes. Thereafter, they returned to the room, where the appellant removed his pants and hid them behind the house. That same day, the appellant, again in Linda Cook's presence, admitted the murder to his stepfather, Enzor Lowe. However, his stepfather testified that he did not believe him, because the appellant was grinning about it.

On April 19, 1979, Calvin Banks discovered the body of the victim when he took a shortcut on his way back from applying for a job at the Dolly Madison Cake Co. When the body was discovered, it was partially decomposed, and the pants the victim was wearing were pulled down to mid-thigh level.

Sometime later, after she had stopped staying with the appellant, Linda Cook contacted the authorities and related what had occurred. She was charged with concealing a death and placed in juvenile detention. She pointed out to the authorities where the appellant had discarded his pants, and they were recovered. Crime Laboratory tests confirmed that the blood on the appellant's pants was human, International Type B. The blood type of the victim could not be established due to decay.

Autopsy results showed the cause of death as asphyxiation, and that numerous post- and ante-mortem bruises were on the body.

[1] In enumerations of error 1, 2 and 10, the appellant urges the general grounds. He argues that the evidence does not support the verdict in that the evidence was circumstantial and did not exclude every reasonable hypothesis save the guilt of the accused. However, the jury was fully charged on circumstantial evidence and the reasonable-hypothesis rule pursuant to Code § 38-109. We do not find from the evidence, or from the lack of evidence, an hypothesis pointing to the innocence of the accused. *Douthit v. State*, 239 Ga. 81(1), 235 S.E.2d 493 (1977). See *Hawes v. State*, 240 Ga. 327(3), 240 S.E.2d 833 (1977); *Corn v. State*, 240 Ga. 130(5), 240 S.E.2d 694 (1977). The credibility of witnesses is a matter left to the jury. Code § 38-1805; *Turner v. State*, 235 Ga. 826(1), 221 S.E.2d 590 (1976).

[2] We find that the evidence, viewed in the light most favorable to the verdict, supports a finding by a rational trier of fact of the essential elements of the crime of murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Fleming v. State*, 236 Ga. 434, 224 S.E.2d 15 (1976).

[3] 2. The appellant contends in his third and eighth enumerations of error that the trial court erred in excusing jurors who were conscientiously opposed to the death penalty and in overruling the appellant's motion to "strike or quash" the Georgia statute providing for death-qualification voir dire questions (Code Ann. § 59-806(4)). We do not agree. It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694, supra; *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

[4] The appellant's assertion that the "death qualification voir dire question" (Code Ann. § 59-806(4)) violates the defendant's right to an impartial jury in that it excludes an identifiable segment of the community, has been raised numerous times before this court, and in each instance has been rejected. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694, supra; *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493, supra; *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976).

[5] The appellant's contention that Code Ann. § 59-806(4) is unconstitutional in that it does not meet the constitutional standards of specificity and clarity in determining the view of the potential juror toward the death penalty, is clearly without merit, as the statute must be construed in light of the applicable case law. *Witherspoon v. Illinois*, supra. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[6] 3. The constitutionality of the Georgia death penalty statute has been upheld by the Supreme Court of the United States and by this court each time it has been attacked on constitutional grounds. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729, supra, and cits. The appellant's ninth enumeration of error is without merit.

[7, 8] 4. The appellant made a motion for the court in camera to inform witness Enzor Lowe of his privilege not to testify as to matters which may incriminate himself or which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family. Code § 38-1205(a). The appellant argues that, since the witness was the stepfather of the appellant, the stepfather's testimony as to the murder would bring infamy upon a member of his household and the court should have instructed him in this regard. However, this enumeration is without merit for two reasons. First, the privilege against self-incrimination is that of the person under examination as a witness, and is intended for his protection only; the defendant on trial has no standing to raise the issue. *Lively v. State*, 237 Ga. 35, 226 S.E.2d 581 (1976) and cits. Second, the privilege would not apply to the testimony of the witness in this case, in that a witness cannot refuse to testify relative to material matters concerning a crime committed by a member of his family on the basis that his answer would bring disgrace, infamy or public contempt upon him or his family. *Brooks v. State*, 233 Ga. 524(2), 212 S.E.2d 355 (1975).

[9] 5. The appellant complains that he was put to trial while still under an outstanding order of incompetency. However, the record does not support such a contention. In response to a special plea of insanity, the appellant was examined by two psychiatrists, who tendered conflicting reports. The court thereafter ordered that the appellant be transferred to the custody of the Department of Human Resources in order that he could be examined by the staff at Central State Hospital. In its order, the court did not find the appellant incompetent to stand trial, but stated that the reason for the transfer was that the appellant "may be presently incompetent." The doctors at Central State, after examining the appellant, certified his competency to stand trial. The appellant was returned to Fulton

County, tendered a plea of not guilty, and proceeded to trial without objection. The appellant's fifth enumeration of error is therefore without merit.

6. In his seventh enumeration of error, the appellant assigns error to the court's failure to charge, in the language requested, the appellant's request to charge number 12, which reads as follows: "All statements shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify conviction."

The appellant did not give any statements to law enforcement authorities; nor did he testify at trial. The appellant did make certain admissions to Linda Cook and his stepfather concerning his commission of the murder, and their testimony concerning these admissions was received at trial.

[10, 11] Prior to closing argument, the trial judge informed defense counsel that he would instruct the jury to scan with care any incriminating statements made by Linda Cook, but the term "confession" would not be used in the jury instructions. Defense counsel agreed to the trial judge's giving of this modified version of defendant's request to charge number 12. Therefore, he cannot complain on appeal. Where defense counsel requests the giving of a certain jury charge, but agrees to the trial judge's giving of another charge in lieu thereof, any error in the charge given is in effect induced. Induced error cannot be complained of on appeal. *Hill v. State*, 237 Ga. 523(3), 228 S.E.2d 898 (1976).

[12] 7. *Sentence Review.* As required by Ga.L.1973, p. 159 et seq. (Code Ann. § 27-2537(c)(1-3)) and to complete our consideration of the appellant's enumerations of error, we have reviewed the death sentence in this case, as we review each case in which a death sentence is imposed. We have considered the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor, and is factually substantiated.

The jury in returning the death sentence found the following statutory aggravating circumstance: That the strangling of a nine-year-old child was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind. Code Ann. § 27-2534.1(b)(7). The appellant, in his sixth enumeration of error, argues that the evidence does not support such a finding. We do not agree. The evidence shows a brutal strangulation murder of a nine-year-old child who weighed less than 60 pounds. The appellant admitted to Linda Cook that he had killed the child by beating him with a stick and choking him to death. The autopsy report showed numerous post-mortem bruises and lacerations. The appellant had a large amount of blood on the front of his pants when he returned to the room where he kept Linda Cook. The victim's pants had been partially removed and the state introduced the defendant's prior record for child molestation and assault with intent to rape during the pre-sentence hearing. Nothing could be more inhuman, depraved or outrageously vile than the killing of a helpless child under these circumstances. This child's murder certainly involved torture of the most sadistic kind. From this evidence, a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind. *Jackson v. Virginia*, supra. See *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979).

We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, supra; *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which life or death sentences were imposed. We find that the following similar cases listed in the appendix support affirmance of the

death penalty. The appellant's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX.

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Presnell v. State*, 243 Ga. 131, 252 S.E.2d 625 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 909 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980).

HILL, Justice, concurring.

The defendant requested that the jury be instructed substantially in accordance with Code § 38-420 regarding "confessions." The trial court charged the jury as to "incriminating statements."

For the last 100 years, defendants have been complaining that the defendant was prejudiced by the court's charging the jury as to "confessions." *Johnson v. State*, 242 Ga. 822, 824, 251 S.E.2d 563 (Hill, J., concurring) (1979). Here the defendant requested a charge on "confessions."

While I concur in Division 6 of the majority opinion, I would go further and hold that a defendant cannot complain that the trial court charged on "incriminating statements" rather than on "confessions"; i. e., that the trial court charged that incriminating statements should be scanned with care and shall be received with great caution.

In the case at bar, the defendant's statements were more than amply corroborated by the blood on defendant's clothes and by his taking Linda Cook to view the body. I therefore concur in the judgment.

THOMAS

v.

The STATE.

No. 36046.

Supreme Court of Georgia.

March 3, 1981.

Defendant was convicted of murder and sentenced to death by the Superior Court, Fulton County, Charles L. Weltner, J. The Supreme Court, 245 Ga. 688, 266 S.E.2d 499, affirmed, and the United States Supreme Court, — U.S. —, 101 S.Ct. 523, 66 L.Ed.2d 285, vacated and remanded. The Supreme Court held that: (1) a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a "depraved mind" for purposes of statute allowing imposition of death penalty, and (2) evidence that defendant killed 9-year-old child by beating him with a stick and choking him to death supported finding that the child suffered serious physical abuse prior to death, a statutory aggravating circumstance justifying imposition of death penalty.

Judgment affirming death sentence reaffirmed.

1. Homicide ⇐354

A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a "depraved mind," for purposes of statute allowing imposition of death penalty when a murder involves torture or depravity of mind. Code, § 27-2534.1(b)(7).

2. Homicide ⇐354

Evidence in prosecution for homicide that defendant killed 9-year-old child by beating him with a stick and choking him to death, supported finding that the child suffered serious physical abuse prior to death, a statutory aggravating circumstance justifying imposition of death penalty. Code, § 27-2534.1(b)(7).

3. Homicide ⇐354

Evidence in prosecution for homicide that defendant had a prior record for child molestation and assault with intent to rape, that defendant had a large amount of blood on the front of his pants following murder of victim, and that the victim's pants had been partially removed supported finding that the victim had suffered serious sexual abuse, which constituted serious physical abuse, a statutory aggravating circumstance justifying imposition of death penalty. Code, § 27-2534.1(b)(7).

Jack Dorsey, Atlanta, Stephen B. Bright, George H. Kendall, Canon, Burns & O'Toole, Washington, for Thomas.

Lewis R. Slaton, Dist. Atty., Carole Wall, Asst. Dist. Atty., Atlanta, Arthur K. Bolton, Atty. Gen., W. Davis Hewitt, Asst. Atty. Gen., for State.

ADDENDUM

By its order of November 17, 1980, the Supreme Court of the United States, — U.S. —, 101 S.Ct. 523, 66 L.Ed.2d 285, vacated this court's judgment in this case as to the death sentence [245 Ga. 688, 266 S.E.2d 499 (1980)] and remanded for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). As mandated by order of the Supreme Court of the United States, this court has reexamined the holding in this case that the evidence supports a reasonable trier of facts' finding beyond a reasonable doubt that the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind. Code Ann. § 27-2534.1(b)(7).

[1] In *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), this court set out standards which must be met in order to constitutionally apply Code Ann. § 27-2534.1(b)(7) in light of *Godfrey v. Georgia*, supra. We held that "torture," as the term is used in the statute, occurs when the victim is

subjected, as in this case, to serious physical abuse prior to death. Furthermore, this court held that serious sexual abuse may be found to constitute serious physical abuse. A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind. The age and physical characteristics of the victim may be considered in determining "depravity of mind."

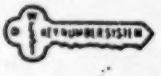
By any rational standard, the murder in this case was outrageously or wantonly vile, horrible or inhuman. In that respect, this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. *Godfrey v. Georgia*, supra; *Hance v. State*, supra; *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980). This was not a domestic murder and the victim gave the appellant no reason to assault him nor was the victim subjecting the appellant to any emotional trauma. The appellant sought to avoid detection of his crime. See *Godfrey v. Georgia*, supra.

[2, 3] As was set out in the opinion in this case, the evidence shows a brutal strangulation murder of a nine-year-old child who weighed less than 60 pounds. The appellant admitted that he had killed the child by beating him with a stick and choking him to death. Such evidence would support a finding by a rational trier of fact of serious physical abuse prior to death. Later, the appellant took his girl friend to the site of the killing and showed her the body of the victim. In her presence, the appellant rolled the body over and, telling her that he had to make sure that he was dead, the appellant jumped on the neck of the victim and then threw the victim's body in the bushes. See *Hance v. State*, supra; *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980). In addition, the appellant had a large amount of blood on the front of his pants when he returned to the room where he kept Linda Cook, and the victim's pants had been partially removed. The state further introduced the defendant's prior record for child molestation and assault with intent to rape during a pre-sentence hearing. Such evidence would authorize a finding of serious sexual abuse to the victim, which would constitute serious physical abuse. *Cape v. State*, supra.[1] In this case, the jury's finding of the statutory aggravating circumstance is complete and supported by the evidence beyond a reasonable doubt. Speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review of the death sentence. See *Godfrey v. Georgia*, supra.

Accordingly, we hold that the jury was authorized to find, consistent with the United States Supreme Court's holding in *Godfrey* and beyond a reasonable doubt, that the appellant's murder of the young child was outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind.

Judgment affirming the death sentence is reaffirmed.

All the Justices concur.



HARDY

v.

The STATE.

No. 35588.

Supreme Court of Georgia.

March 3, 1981.

On appeal of defendant's conviction for murder and his death sentence, the Supreme Court, 245 Ga. 272, 264 S.E.2d 209, affirmed. The Supreme Court of the United States, — U.S. ——, 101 S.Ct. 523, 66

1. See *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974) and *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977), cited in *Godfrey v. Georgia*, supra.

Grady Memorial Hospital

June 4, 1979

80 Butler Street, SE, Atlanta, Georgia 30303, Telephone 404 659-1212

J W Ponsolle, Jr
Executive Director

Asa G Yancey, M D
Medical Director

Weston D Benyman, Jr
Assistant Director
Administrative Services

Thomas L Collier
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Hughes Spalding Pavilion

T E Garner Jr
Assistant Director
Administrative Services

Frank K Lawlor
Assistant Director
Professional Services

Robert L Parham, Jr
Assistant Director
Ambulatory Care

E R White
Assistant Director
Fiscal Affairs

Charles H Wilson, Jr
Administrator
Hughes Spalding Pavilion

Mary F Woody, R N
Assistant Director
Director of Nursing

To call 6-25

The Honorable Charles L. Weltner, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
136 Pryor Street, SW
Atlanta, Georgia 30303

Re: Mr. Donald Wayne Thomas

Dear Judge Weltner:

Mr. Donald Wayne Thomas, Indictment #A-44518, was evaluated on June 1, 1979 pursuant to a court order received on May 23, 1979. The following comments reflect a summary of the observations obtained during the course of the interview with Mr. Thomas. There was no additional history or background information available at the time of the evaluation.

PURPOSE OF EVALUATION: Mr. Thomas was informed that the evaluation had been requested by the court and that a summary of observations would be forwarded to the court for its potential use in the disposition of his case. In response to a question regarding his understanding of the charges against him, he stated "I turned myself in on an assault case and they came out here and said I killed a little white boy."

MENTAL STATUS EXAMINATION: Mr. Thomas presented as an alert, rather slender black male dressed in an institutional green jumpsuit, unkempt in his appearance and exhibiting poor personal hygiene. He sat rigidly in his chair staring past the examiner and demonstrated little spontaneity in response to questions. He stated that he had no idea of the month or the day and when asked the year he acknowledged his identity and stated that "I'm in the jail, big rock jail in Atlanta." His speech was characterized by tangential to loose associations, however, he denied experiencing delusional ideations and/or perceptual distortions in the form of either auditory of visual hallucinations. His affect was markedly flattened and his mood was depressed, without evidence of overt suicidal or homicidal ideation. As the interview progressed, and he was questioned more closely regarding his current mental status, he became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands. His objective judgment was determined to be significantly impaired as a result of his markedly inappropriate behavior. His insight was considered to be nil. As a result of his inability to respond to questioning, the clinical interview was terminated.

I was unable to elicit any substantial family or personal history as a result of his mental status, however the above noted observations are clearly indicative of a diagnosis of Schizophrenia. In the absence of history to the contrary, I must assume that this psychotic behavior is a manifestation of an acute process. Clinical recommendations would include the transfer of Mr. Thomas to an inpatient psychiatric facility in the interest of eliminating his psychotic symptoms. He was placed on Thorazine

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BOOK 881 PAGE 330

50 mgs. twice a day at the close of the interview.

FORENSIC CONSIDERATIONS: Mr. Thomas appeared aware of the charges against him, however as a result of his psychotic state, he did not appear to appreciate his role in the proceedings pending before him nor was he able to communicate effectively with this examiner. It is my impression that Mr. Thomas, as a result of psychotic decompensation, is unable to actively participate in the legal proceedings against him and is so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense.

I am unable to offer an opinion regarding his mental status at the time of the alleged offenses, as his state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense.

Respectfully,

Lloyd T. Baccus, M.D.
Director, Inpatient Psychiatry
Psychiatry & Law Service

LTB:reb

cc: Ms. Carole E. Wall
Asst. District Attorney

Mr. Robert M. Coker
Public Defender

BOOK 861 PAGE 331

SHELDON B. COHEN, M. D.
804 PEACHTREE MEDICAL BUILDING
401 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30308

Telephone 525-6138

August 8, 1979

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Fulton County Courthouse
Atlanta, Georgia 30303

Re: Donald Wayne Thomas
Indictment No. A-44518

Dear Judge Weltner:

Pursuant to your order of 7 August 1979, Mr. Thomas, who is accused of murder, was seen in psychiatric consultation to determine his capacity to cooperate meaningfully with counsel and to stand trial.

Mr. Thomas was brought to my office ahead of time by two Sheriff's deputies. He sat quietly in the waiting room until I called him. He is a 19 year old, single, Negro male who apparently had been employed regularly as an unskilled laborer in a restaurant for several years.

I explained the purpose of the interview and asked him what he understood it to be and he said, "You are supposed to be a doctor and they say I am crazy, I reckon." However, he said he didn't think he was crazy. He said that he had been in jail for some time, having given himself up "for an assault case." He said that he knew he had done something wrong and he wanted to get it over with.

When asked for details of the assault charges, he said that it was over with, that it was in the past and he did not want to talk about it. When asked about murder charges, he stated that he had been in court on the assault charges and that someone telephoned the court saying that he had committed murder, that they went out and looked for the body and found it. He said the call must have been from someone who did not like him and that he did not have anything to do with this incident, that he had been in jail at the time. He continually denied knowing anything about the murder of a nine year old white boy and strongly implied that many of his difficulties were because his ex-girl friend, Linda Cook, was angry with him and would do anything to hurt him. He said this was because of urinary incontinence present for seven years and that she and others made fun of him because of this.

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Martha Nolan
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BOOK 875 PAGE 414

He was able to give me fundamental, historical information about his mother, four brothers and his work history.

During the interview he was at times angry, negativistic and provocative; for example, smoking a cigaret in the waiting room despite a sign on the door asking people to not smoke. He initially seemed to be pretending not to understand or comprehend anything that was asked of him; for example, when asked if he would like a Coca-Cola or coffee, he looked up and said, "What is that?" Later, as he began talking and became less defensive it was quite apparent that he was very much aware of such phenomenon and he asked if he could have a piece of candy which he noted in a jar in my office.

The interview conducted by Dr. Baccus in early June showed apparently quite different behavior, so that he seemed unresponsive to simple, every day questions. He apparently was placed on a tranquilizer (Thorazene 100 mgs. daily) and this may account for the difference in manner and behavior at this time. It is of course also possible that he may have simulated more in the previous interview than he did today.

At this time I cannot arrive at either a definitive diagnosis or answer the questions as to his mental capacity to assist in his own defense and to stand trial. There is conflicting information from the Grady interview and that which I obtained today. Consequently, I would recommend extended observation at Central State Hospital in order to clarify these factors.

Thanking you for asking me to see Mr. Thomas, I am

Sincerely,

Sheldon B. Cohen

Sheldon B. Cohen, M. D.

SBC:hcm
Encl.

FORENSIC SERVICES DIVISION

CENTRAL STATE HOSPITAL

Milledgeville, Georgia 31062

September 24, 1979

(912) 453-4381

A 44518

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Courthouse
Atlanta, Georgia 30303

Re: Thomas, Donald Wayne
Case No. 228,112
Fulton County
Binion 2 South

Dear Judge Weltner:

Mr. Donald Wayne Thomas was admitted to the Forensic Services Division of Central State Hospital on August 27, 1979 by Order of your Court. We understand that he is charged with Murder. Your Order states that the defendant may be presently incompetent to participate in his defense and that because of conflicting reports from two other psychiatrists, further evaluation by the court is requested.

The physical examination was unremarkable. Neurological examination including brain scan, skull series, electroencephalogram and neurological consultation are all within normal limits. All routine laboratory procedures were within normal limits. The chest x-ray was negative. Although Mr. Thomas has had vague urinary complaints, his urinalysis has been within normal limits.

On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process. Based on our examination, evaluation, and information available to us, he has been given the diagnosis of Latent Schizophrenia. He gives no other history of psychiatric treatment.

Based on our examination and evaluation, we have concluded that he is aware of the charge pending against him and the possible consequences. He is able to relate to his attorney in the preparation of his defense. Therefore, we consider him competent to stand trial.

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SEP 27 1979

DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

BOOK 887 PAGE 33

As to his degree of criminal responsibility, it is our opinion that he is able to distinguish between right and wrong, and was not acting under the influence of a compulsive delusion which overmastered his will to resist committing the alleged offense.

Please send a duly authorized person for him at your earliest convenience.

Very truly yours,

Jose M. Delatorre, M.D.
Medical Director
Forensic Services Division

JMD:id

cc: Honorable Lewis R. Slaton (Enclosed)
Defense Counsel (Enclosed)

BOOK 887 PAGE 34

[INSTRUCTIONS PRIOR TO PENALTY PHASE OF TRIAL:]

THE COURT: Members of the jury, it is my duty as the Presiding Judge to instruct you now as to the law governing the sentencing phase of this case. The instructions given you earlier in this case and the rules of law outlined to you in this portion of the instructions apply also to your deliberations as to penalty.

The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.

In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

Such a circumstance is defined as a

statutory aggravated circumstance under the law of this state.

Members of the jury, you have found this defendant guilty of the offense of murder, and you may recommend one of two sentences as punishment, if you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State. If you do so find, you may recommend that this defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt," and you must set forth in writing the aggravated circumstances which you find to exist.

If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this state is electrocution.

The other punishment which you may recommend in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this defendant should be put to death, you would return a verdict as follows:

"We recommend life." The effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Members of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstances in this case, which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized, under these circumstances, to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion, and you may provide for a life sentence for this accused for any reason that is satisfactory to you, or without any reason, if you care to do so.

The law vests the exclusive right with the jury to either make or withhold a

recommendation for the death sentence.

Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding the death penalty cannot be imposed. In that event, your verdict would be, "We recommend life," the effect of which would be that the Court would sentence this defendant to life in prison.

The law requires that the Presiding Judge give to the jury certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will give you this written charge.

Now, Ladies and Gentlemen, in the event that you recommend the death penalty in this case, you must write out the recommendation of your findings as to any statutory aggravated circumstances in the form which I have given

to you in these instructions.

Your verdict must be unanimous; that is, agreed to by all 12 of your members. It must be in writing, dated, and signed by your foreman.

You may retired to consider your verdict.

The alternates will kindly stand aside.

(Whereupon the jury retired to the jury room, at 4:20 p.m.)

THE COURT: Any exceptions?

MS. WALL: I have none, Your Honor.

MR. COKER: Your Honor, at this time, Your Honor, however, I would specifically reserve any objections.

THE COURT: I see. All right. Any exceptions are, of course, reserved.

Do you want to look at that?

MR. COKER: Okay.

(At 5:44 p.m. the following transpired.)

THE COURT: Now, for the record, it being about 5:45 p.m., I have this question. "May you advise us the soonest a person can be released if given a life sentence?" I propose to answer that as follows: "I am not permitted to answer this question. Signed."

IN THE SUPREME COURT OF GEORGIA

DONALD WAYNE THOMAS, Appellant	)	
against	)	No. 36046
STATE OF GEORGIA, Appellee	)	

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

Appellant, Donald Wayne Thomas, by his undersigned counsel, respectfully moves this Court for full briefing and for oral argument of the issues raised by the vacation of his sentence of death ordered by the Supreme Court of the United States and the remand of his case "for further consideration in light of Godfrey v. Georgia, 446 U.S. _____, 100 S.Ct. 1759, 64 L.Ed.2d 398, (1980)."

Prior Proceedings

Appellant was convicted of the murder of Dewey Baugus on October 24, 1979, and was sentenced to death. The trial jury found one aggravating circumstance, that the murder had been "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." Ga. Code Ann. §27-2534.1(b)(7).

This Court affirmed appellant's conviction and sentence in Thomas v. State, _____ Ga. _____, 266 S.E.2d 499 (1980). No motion for rehearing was filed.

In his petition for certiorari, the appellant presented three issues: whether he was denied due process by the trial court's failure to conduct a hearing to determine his mental competency prior to trial, whether the absence of a limiting construction of the aggravating circumstance in Ga. Code Ann. §27-2534.1(b)(7) violated petitioner's rights under the Eighth and Fourteenth Amendments, and whether petitioner was denied his Sixth and Fourteenth Amendment rights as construed in Witherspoon v. Illinois, 391 U.S. 510 (1968), in the jury selection process.

On November 17, 1980, the Supreme Court entered the following order:

> The motions of petitioners for leave to proceed in forma pauperis and the petitions for writs of certiorari are granted. The judgments are vacated and the cases remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. _____ (1980). Chief Justice Burger, Justice Blackmun, Justice Powell and Justice Rehnquist dissent.

49 U.S.L.W. at 3371.[1/]

Issues Presented on Remand

This case presents important constitutional issues left unresolved by the Supreme Court's decision in Godfrey

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1/ The same order was issued in the cases of Patrick v. Georgia, and Hardy v. Georgia, 49 U.S.L.W. 3371.

v. Georgia, supra, which should be addressed by this Court only after full briefing and argument. In addition, if provided the opportunity to brief and argue this case, appellant would bring to the attention of this Court further authority on the question of whether trial of this case without a mental competency hearing violated his right to due process of law. A full hearing of these issues would be consistent with the statutory[2/] and constitutional[3/] rights of appellant and be in the interest of justice in this case.

The issues which appellant seeks to address in a brief to this Court are as follows:

1. Whether appellant is entitled to a new sentencing hearing because the trial court did not define for the jury the terms of the aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(7).

2/ Ga. Code Ann. §27-2537(d) provides that where this Court reviews a sentence of death "[b]oth the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court."

3/ The Sixth and Fourteenth Amendments guarantee appellant the right to counsel not only at sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948), but also on appeal. Douglas v. California, 372 U.S. 353 (1963). If this right is to be meaningful, appellant should be provided the opportunity to present his views through counsel before a decision by this Court. Moreover, because of the "qualitative difference" between death and any other penalty, there is a corresponding difference under the Eighth Amendment "in the need for reliability in the determination that death is the appropriate punishment . . . ." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Undoubtedly, Georgia law provides for briefs and mandatory oral argument in cases involving the death sentence in recognition that such participation by the parties will assist the Court in making a sound and reliable decision.

In Godfrey v. Georgia, supra, the Supreme Court reversed a death sentence based upon §(b)(7) where the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms." Godfrey v. Georgia, supra, 100 S.Ct. at 1765 (Plurality opinion). The Court pointed out that "the jury's interpretation of §(b)(7) can only be the subject of sheer speculation." Id.

The same is true in appellant's case. The trial court provided the jury with nothing more than the bare words of §(b)(7) in both its oral and written instructions. Tr. at 565-566, 597.4/

Thus, this Court must decide whether appellant is entitled to a new sentencing hearing at which the sentencer's discretion will be channeled by "clear and objective standards" that provide "specific and detailed guidance" which make "rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, supra, 100 S.Ct. at 1764-65; Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffit v. Florida, 428 U.S. 242, 253 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Mr. Justice Marshall's concurring opinion in Godfrey expresses the view that only a properly instructed jury may impose the sentence of death:

4/ The trial court instructed the jury:

> In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this State.

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

100 S.Ct. at 1769 (Marshall, J., concurring).

Without dealing further with this issue at this time, appellant respectfully submits that this question is an important and complex one and that the parties could assist this Court in resolving it by providing briefs and arguments prior to any decision.[5/]

2. Whether Ga. Code Ann. §27-2534.1(b)(7) was applied in an unconstitutionally vague or overbroad fashion in this case.

Assuming arguendo that appellant is not entitled to a new sentencing hearing, there remains the question whether, in light of the Supreme Court's decision in Godfrey, the aggravating circumstance set out in §(b)(7) was properly applied to the facts of this case.

5/ It is of course clear that appellant cannot be resentenced by this Court. Ga. Code Ann. §§27-2503(b), 26-3102 provide that the jury is the sentencing authority, and this Court is charged under Ga. Code Ann. §27-2537 with appellate review of sentences imposed by the trial court. No statutory provision gives this Court power to act as a sentencing authority de novo in a capital case.

The Supreme Court in Godfrey, supra, and this Court in Hance v. State, _____ Ga. _____, 268 S.E.2d 339 (1980), defined some of the boundaries of the application of §(b)(7). Moreover, this Court has made clear its intention to limit the application of §(b)(7) to cases that lie "at the core and not the periphery" of the conduct covered by that aggravating circumstance. Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976).

This case was originally briefed, argued and decided prior to the holdings in Godfrey and Hance. Appellant respectfully urges this Court to permit him to put forward in a brief and an argument his position as to the applicability of those decisions to this case.

3. Whether the failure of the trial court to conduct an evidentiary hearing and make findings on the issue of appellant's mental competency deprived him of due process of law.

Although the issue of appellant's competency was raised in the brief filed in his original appearance before this Court, the Court was not directed to several cases decided by the United States Supreme Court on this issue. Since this case is now before this Court for further review, it would be in the interest of justice and judicial economy for this Court to consider additional arguments on this issue.

Appellant was examined by three psychiatrists prior to trial and diagnosed as schizophrenic. The three were evenly divided in their opinions as to his competency. Dr. Lloyd T. Baccus, M.D., found appellant incompetent, Dr. Sheldon B. Cohen could not state an opinion, and a letter signed by Dr. Jose M. Delatorre, the medical director of the forensic services divison at Central State Hospital, expressed the view that appellant was competent.[6/]

All of this psychiatric opinion was received in letters to the Court. Much of the information contained in the letters was conclusory in nature. No testimony was taken on the question of competency and there were no judicial findings as to appellant's competency to stand trial.

In its intial review of appellant's conviction, this Court rejected appellant's assertion that he should not have been tried until resolution of the competency issue, basing its decision on the fact that Central State Hospital "certified" his competency to the trial court and, apparently, its view that appellant may have waived the issue by proceeding to trial "without objection." Thomas v. State, supra, 266 S.E.2d at 502-03.

However, the briefs submitted to this Court during the course of that appeal failed to direct the attention of this Court to Supreme Court cases indicating that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."

6/ It is not apparent from the letter whether appellant was examined by Dr. Delatorre or other members of the hospital staff. The letters appear in the record on appeal at 6-7 and 14-17 and are appended to the Report of the Trial Judge to this Court.

Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956), reversing 96 U.S. App. D.C. 117, 223 F.2d 582 (1955). It appears that where there is conflicting documentary evidence on the question of competency, as was the case here, an evidentiary hearing is required. In Bishop v. United States, supra, the Supreme Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of competency without a hearing on the information before the trial court, which included a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curium decision, the Supreme Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961.7/

Moreover, appellant would respectfully point out that the right to not be tried while incompetent is not a right which can be waived. As Mr. Justice Harlan observed in Pate v. Robinson, supra, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity

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7/ In accordance with the Supreme Court cases, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise a doubt as to the defendant's competency. See, e.g., Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, _____ U.S. _____, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill, 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967).

to stand trial." Id. at 384 In his dissenting opinion in that case, Mr. Justice Harlan pointed out that if there were error on the question of competence "such an error is not 'waived' by failure to raise it . . . . Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers." Id. at 388. (Harlan, J., dissenting). Thus, state and federal courts have squarely held that the issue of incompetency was not waived by failure to assert it prior to trial where evidence raising a question as to competency was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where, in a case decided before Pate v. Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so . . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant, unlike appellant, did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State v. Jensen, supra, 278 Minn. at 216-17, 153 N.W.2d at 342; People v. Livingston, 57 Mich. App. 726, 226 N.W.2d 704, 709-10 (1975).

Because there is a substantial question of constitutional significance as to whether the trial court's treatment of the competency question comported with due process, full briefing and argument before this Court on the issue would be appropriate.

Conclusion

For the reasons stated herein, appellant respectfully urges this Court to permit him to brief and argue orally these issues on remand on a schedule to be established by this Court, in order to assist the Court in resolution of these complex and important issues.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Assistant District Attorney Carole Wall, Third Floor, Fulton County Courthouse, Atlanta, Georgia, 30303, and upon Attorney General Arthur Bolton, Judicial Building, Atlanta, Georgia 30334, by mailing a copy of the same to each of them this 18th day of December, 1980.

Stephen B. Bright

[Death-qualifying voir dire of Ms. Frances Ogletree:]

[THE COURT:] Give your name, please, ma'am.

THE JUROR: Frances Ogletree.

THE COURT: Mrs. Ogletree, the Court inquires, are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop in the trial of this case if you were selected as a juror?

THE JUROR: I believe I would go on the evidence.

THE COURT: Well, the question is, would you automatically vote against capital punishment without regard to any evidence that might be developed at the trial of the case?

THE JUROR: No. No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the defendant's guilt, again assuming that you are selected as a juror?

THE JUROR: I don't quite understand that, Judge Weltner.

THE COURT: Well, you said that you were opposed to capital punishment.

THE JUROR: Right.

THE COURT: I am asking you whether that feeling on your part would prevent you from making an impartial decision as to the question

of guilt or innocence?

THE JUROR: I'm afraid it would.

THE COURT: All right.

MS. WALL: Your Honor, I move that she be excused for cause.

THE COURT: Mr. Coker?

MR. COKER: I object, on the grounds previously stated.

THE COURT: All right, ma'am, you may be excused. Please check back on the fourth floor and see if they need you any more.

[Death-qualifying voir dire of Joyce Beachum:]

THE CLERK: Mrs. Joyce Beachum.

THE COURT: Mrs.Beachum, the Court inquires of you as follows. Are you conscientiously

opposed to capital punishment?

THE JUROR: Opposed? I don't know.

THE COURT: Ma'am --

THE JUROR: I never thought about it.

THE COURT: Let me ask you this question. Would you automatically vote against the imposition of a death sentence without regard to any evidence that might be developed in the trial of the case, if you were a juror in a case?

THE JUROR: No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the question of guilt or innocence?

THE JUROR: No.

BY MS. WALL:

Q Mrs. Beachum, you say you have never considered capital punishment?

A No. You read about it, you think about it, but unless it affects you, you know, you never just really, you know, think about it real deep.

Q All right, ma'am. Could you consider a case so horrible that you would write out a death sentence on a person, if you were the foreman of a jury?

A Could I do what now?

Q Could you consider the circumstances, the circumstances of the murder were such, that if you were foreman of the jury you could write out, we the jury sentence the defendant to death?

A No.

Q You could not write out the death sentence?

A I don't think so.

Q Ma'am, are there any circumstances so horrible that you could consider the death sentence?

THE COURT: Excuse me, consider writing it out.

BY MS. WALL:

Q Consider imposing it?

A Imposing it. Well, I guess I could consider imposing it. You mean, help carrying it out, right?

Q No. I mean, can you vote for the death sentence? Could you go in that jury room and vote for the death sentence?

A Oh, no.

MS. WALL: Your Honor, I'd ask that she be excused for cause.

THE COURT: You want to inquire further?

MR. COKER: Yes, Your Honor.

BY MR. COKER:

Q Mrs. Beachum, are you employed outside the

home?

A Yes.

Q In what capacity?

A I am a resident manager for Paradise Apartments.

Q And where is that located?

A Well, the base office is on 504 Fifth Street, but I work on Hollywood Road.

Q Now, are you conscientiously opposed to capital punishment?

A Opposed to it?

Q Right.

A Okay. You are saying am I against capital punishment?

Q Right.

A Yes, I am against it.

MR. COKER: Your Honor, I request the Court to reiterate the second and third qualifying questions on that, before making a ruling on whether she should be struck for cause.

THE COURT: Now, Madam Juror, listen very carefully to these questions here. If there is anything about the question you don't understand, you ask me. We have got all day to answer the questions, so don't get nervous or

feel like anybody is rushing you. What I have got to know under the law is this. Regardless of what the evidence might be in a case, is your feeling about capital punishment such that you would automatically vote against the death sentence, no matter what the evidence might be?

THE JUROR: Okay, I don't like the death sentence, and I just feel that there could be another way of doing things, so --

THE COURT: Now, answer my question. Notwithstanding that --

THE JUROR: All right.

THE COURT: -- and regardless of what the evidence in the case might be, is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?

THE JUROR: No.

THE COURT: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?

THE JUROR: Yes.

THE COURT: And we are talking about voting to send someone to the electric chair to be electrocuted.

THE JUROR: Mmh-hmm.

THE COURT: Now, ma'am, answer this question. Is your attitude toward the death penalty as you have expressed it today, is that such as would prevent you from making an impartial decision as to the question of whether or not the defendant is guilty or innocent, independent of punishment?

THE JUROR: I think I could make a fair judgment.

THE COURT: About guilt or innocence?

THE JUROR: About guilt or innocence.

THE COURT: All right, Ms. Wall.

MS. WALL: Your Honor, I'd ask that she be excused for cause.

MR. COKER: I object to that, Your Honor.

MS. WALL: She has stated, based upon my question, that she could not go in there and vote for the death penalty. That is what she told me in her answer.

THE COURT: Well, let me inquire further. Now, you recall the question Ms. Wall is talking about. Do you want to comment on that? Either your mind is such that there are cases where you could vote for the death penalty, or

there is no possible case where you could vote for the death penalty, and the Court has got to know which one of those is yours.

THE JUROR: Okay. Now, if we find the person -- if all evidence show that he was guilty, then I could render a judgment on that.

THE COURT: On whether the defendant is guilty?

THE JUROR: Yes.

THE COURT: Now, assume that you find the defendant guilty, would you be able, in any case, to vote for the imposition of a penalty of execution; that is, to impose the death penalty?

THE JUROR: Well, I guess if that's the alternative, yeah, if that's the last thing that's left.

THE COURT: You would be able to vote for a death penalty?

THE JUROR: If that's the only thing, if this is what you are asking.

THE COURT: I am asking you, ma'am, whether or not --

THE JUROR: Yes.

THE COURT: Whether or not there is any case, notwithstanding the fact that you don't like the death penalty, you think there is other means, is there any case that you can conceive that you would vote to send somebody to the electric chair to be executed?

THE JUROR: No.

THE COURT: All right, what do you say?

MS. WALL: I ask that she be excused for cause.

THE COURT: What do you say, Mr. Coker?

MR. COKER: I object to any excuse for cause.

THE COURT: Would you be good enough to wait in there just a minute, please.

(Whereupon the juror left the courtroom.)

THE COURT: Do you want to argue that, or just note your objection?

MR. COKER: Your Honor, she has --

THE COURT: I know what she has done. She has said three or four different things, but the last time she said she could not.

MR. COKER: Judge, in view of her other ambivalent answers, and the fact that it has taken a great deal of the Court's time to ask these questions, I would object to any excuse

for cause with this prospective juror. She has not categorically said that she will not impose the death penalty.

THE COURT: That is what she just said, Mr. Coker. That is as categoric as you can get. That is not what she said before, I agree.

MS. WALL: I ask to strike her for cause.

THE COURT: Well, I think, as a matter of fact I will strike her for cause, and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending somebody to the electric chair to be executed her ambiguity seems to fade away. I will have to grant the motion of the State.

All right, ask the lady to come in here, please, sir.

(Whereupon the juror returned to the stand.)

THE COURT: Okay, Mrs. Beachum, the Court is going to excuse you. Thank you very much. Please check back on the fourth floor, see if they need you.

All right, Mr. Sheriff.

[Death-qualifying voir dire of Eddie Watkins:]

THE CLERK: Eddie M. Watkins.

THE COURT: Mr. Watkins, the Court asks you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of this case, if you were selected as a juror?

THE JUROR: No, I wouldn't automatically vote against it, no.

THE COURT: The Court inquires as follows. Can youconceive of a case wherein you would vote to impose capital punishment; that is, to vote to have a defendant convicted of murder, sent to the electric chair for electrocution?

THE JUROR: If the Court, you know -- no, I couldn't. No, I wouldn't do that. No, I would not.

THE COURT: All right. Would your attitude toward the death penalty prevent you from making an impartial decision as to the defendant's guilt; that is, on the question of guilt or innocence. Again, if you were selected to serve in this case.

THE JUROR: No, it would not.

THE COURT: You want to inquire?

MR. COKER: Your Honor, I'd like a clarification of your next to last question. The answer thereto.

THE COURT: I believe he said no, he could not do that. I interpret that to mean there is no case wherein he could conceive he would willingly vote to impose the death sentence. Now, if I'm incorrect --

THE JUROR: I thought you said capital punishment.

THE COURT: That is sending somebody to Reidsville to the electric chair to be executed.

THE JUROR: No, I wouldn't vote that way.

MS. WALL: Your Honor, I move he be excused for cause.

MR. COKER: Your Honor, I object for the same reason.

THE COURT: All right, you may be excused.

I think we had better explain to this jury the question that I am going to ask each of them, so that they can be thinking about that, and don't get hit, maybe, cold.

All right, we will take the next 12 and

do whatever general voir dire either of you wish to do, after putting them in the box.

[Death-qualifying voir dire of Ms. Christine Reese:]

THE CLERK: Ms. Christine Reese.

THE COURT: All right, let me ask you, ma'am, are you conscientiously opposed to capital punishment?

THE JUROR: Yes, I am.

THE COURT: Does that mean that under no circumstances would you consider voting for a death penalty?

THE JUROR: Well, I would have to hear the facts.

THE COURT: What I am asking you is this. Is your opposition to capital punishment such that there would be no case in which you would vote for capital punishment?

THE JUROR: No.

THE COURT: You want to inquire further?

MR. COKER: Judge, I'm not sure I understood her answer.

THE COURT: I think it was, no, there is not. Is that your last answer, ma'am?

THE JUROR: If I understood you to say

are there any circumstances, I would just say no to it.

THE COURT: All right. I want to ask you this. I want to ask you, if your view on capital punishment is so strong that under no circumstances, that you could conceive, would you ever consider voting for the death penalty if you were a juror? That is the question.

THE JUROR: No, my views are not that strong.

THE COURT: Well, is it such that, such that you might, under some evidence in the case, vote for the death penalty?

THE JUROR: Under extreme cases, extreme, but I don't believe in corporal punishment.

THE COURT: Well, in an extreme case, as you might view that word, would you be willing to consider voting for the death penalty, in an extreme case?

THE JUROR: I don't think I could. I don't think I could.

THE COURT: Would your view on capital punishment prevent you from making an impartial verdict on the question of whether or not the

defendant is guilty or innocent?

THE JUROR: No.

THE COURT: It would not?

THE JUROR: No, sir.

BY MS. WALL:

Q Mrs. Reese, is there any case where you yourself could go into a jury room and vote to sentence someone to the electric chair at Reidsville.

A No, ma'am.

MS. WALL: Your Honor, I ask that she be excused for cause.

THE COURT: You want to inquire further, Mr. Coker?

MR. COKER: Your Honor, at this time I would just object.

THE COURT: Okay. Mrs. Reese, now, you can be excused. Please go back down to the fourth floor and tell them you are available for further service.

THE JUROR: All right.

THE COURT: Thank you, ma'am.

[Death-qualifying voir dire of Evelyn Thompson:]

THE CLERK: Mrs. Evelyn Thompson.

THE COURT: Mrs. Thompson, I inquire of you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Well, I don't really know that much about it. I mean -- you mean -- explain that one more time, about capital punishment, please, sir.

THE COURT: Capital punishment means electrocution in the electric chair, imposition of the death sentence. Are you conscientiously opposed?

THE JUROR: Yes, I am.

THE COURT: Now, let me ask you this.

Would you automatically vote against the imposition of the death sentence without regard to any evidence that might be developed on the trial of the case?

THE JUROR: No.

THE COURT: Now, would your attitude toward the death penalty prevent you from making an impartial decision as to the question of guilt or innocence?

THE JUROR: I really don't know, at this point.

THE COURT: Well, let me explain to you that under the procedure of the State, in a case where the death penalty is sought, the jury first determines whether or not a defendant is guilty or innocent without considering the question of punishment. Only, of course, if the defendant is found guilty would the question of punishment be considered. Now, I am asking you, would your attitude on capital punishment render you unable to make an impartial decision as to the question of guilt or innocence?

THE JUROR: I'm afraid it would.

MS. WALL: Your Honor, I'd ask that she

be excused for cause.

MR. COKER: I object on the grounds previously stated in Court.

THE COURT: All right, Mrs. Thompson, we will excuse you. You need to be back at 9:20 with the other jurors. You will not have any further responsibility in this case.

THE JUROR: Okay, thank you.